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In re: W245BL, Branchport, NY
Facility ID No. 147188
File No. BPFT-20080714ADP
File No. BLFT-20080822ABF

Petition for Reconsideration

Dear Counsel:

We have before us a "Petition for Reconsideration and Request for Reinstatement of Minor Modification Application *Nunc Pro Tunc*" ("Petition") and concurrent amendment ("Amendment") to the above-captioned application for a construction permit to modify FM translator W245BL, Branchport, New York (the "Station"), to relocate its transmitting antenna and change its community of license from Branchport to Dundee and Penn Yan, New York ("CP Application"),[1] both filed by Lake Country Broadcasting, Inc. ("Lake Country") on July 9, 2013, and related pleadings.[2] Lake Country seeks partial reconsideration of a June 20, 2013, letter decision to the extent that it: (1) rescinded the grant of the CP Application; (2) dismissed the CP Application; and (3) dismissed the related license to cover application ("License Application").[3] For the reasons set forth below, we grant the Petition, reinstate the CP Application and License Application *nunc pro tunc*, and grant the CP Application.

Background. The CP Application is the latest in a series of translator "hops" (serial antenna relocations) during which Station W245BL's operating frequency was changed, through two intermediate station modifications, from Channel 251 to Channel 245.[4] In the *Letter Decision*, we granted Saga's

[1] File No. BPFT-20080714ADP. The CP Application was granted on July 22, 2008. Saga Communications of New England, LLC ("Saga") filed a petition for reconsideration of that grant on August 14, 2008. Saga is the licensee of full service Station WYXL(FM), Channel 247B, Ithaca, New York.

[2] On July 19, 2013, Saga filed an "Opposition to Petition for Reconsideration and Request for Reinstatement of Minor Modification Application *Nunc Pro Tunc*" ("Opposition"). On July 26, 2013, Lake Country filed a "Reply to Opposition to Petition for Reconsideration and Request for Reinstatement of Minor Modification Application *Nunc Pro Tunc*" ("Reply").

[3] *Gary S. Smithwick, Esq.*, Letter, 28 FCC Rcd 8929 (MB 2013) ("*Letter Decision*"); *see* File No. BLFT-20080822ABF (license to cover application). All other actions taken in the *Letter Decision* remain in effect.

[4] Lake Country first moved the Station's antenna location, though a series of modifications, so that its 48 dBμ contour lay entirely outside Station WYXL(FM)'s 54 dBμ protected contour. *See, e.g.*, File No. BMPFT-

petition for reconsideration, rescinded the grant of the CP Application, and dismissed the CP Application because the proposed facilities would result in prohibited overlap with the protected contour of Station WYXL(FM) but failed to satisfy the "lack of population" exception of Section 74.1204(d).[5] In the Petition, Lake Country proposes a new interference contour that "clears ground level by at least 12.1 meters" within the predicted overlap area.[6] Because there are no buildings within this vertical clearance area that are greater than two stories (six meters), according to Lake Country, its proposal now satisfies the "lack of population" exception to the contour overlap rule. Therefore, Lake Country requests reinstatement of the CP Application and License Application *nunc pro tunc*, pursuant to our longstanding policy allowing minor curative amendments filed within 30 days of an initial dismissal or return.[7]

In its Opposition, Saga contends that reinstating the CP Application would: (1) adversely affect LPFM applicants filing for new stations or major changes in the currently open October LPFM filing window[8]; and (2) allow translator "hopping," in contravention of recent Commission policy. Specifically, Saga argues that grant of the CP Application *nunc pro tunc*,i.e., as of its original filing date rather than July 9, 2013, the Amendment filing date, would give Lake Country an "unfair competitive advantage" and deprive LPFM applicants of the protection they would otherwise have from any application filed after June 16, 2013.[9] Therefore, Saga suggests that Lake Country be required to file a new minor change application.[10] Regarding translator "hopping," Saga argues that Lake Country's serial modifications constitute an abuse of process analogous to that committed by a licensee who makes a series of minor change "hops" to achieve an otherwise impermissible "major change" relocation.[11] Saga also argues that, in the course of each "hop," Lake Country may have committed certain specific rule violations: namely, failure to obtain reasonable assurance of site availability, failure to provide dependable service, and failure to notify the Commission of discontinued operations. Therefore, Saga recommends that the Commission issue a letter of inquiry regarding these possible violations and suspend processing of the CP

20080428ACN, Exhibit 12, "First Adjacent Interference Study." These modifications were permissible as either not creating prohibited overlap under 47 C.F.R. § 74.1204(a) or not creating actual interference (as determined using the signal strength ratio method) under 47 C.F.R. § 74.1204(d). *See, e.g.*, BMPFT-20080321ACE, Exhibit 13. During these initial antenna relocations, Lake Country also changed the Station's frequency from Channel 251 to Channel 249. Once its interfering contour was entirely outside Station WYXL(FM)'s protected 54 dBμ contour, Lake Country again changed frequency, this time to Channel 246, first adjacent to Station WYXL(FM)'s Channel 247. See File No. BMPFT-20080428ACN. Finally, Lake Country changed to its current frequency, Channel 245, second-adjacent to Station WYXL(FM), and embarked on a series of antenna relocations to return the Station's transmitting antenna to its approximate starting location. The CP Application represents the last modification in this series.

[5] *Letter Decision* at 3; *see* 47 C.F.R. § 74.1204(a),(d). Lake Country's "lack of population" claim was supported by outdated topographical maps and thus refuted by up-to-date maps submitted by Saga.

[6] Petition at 4.

[7] Petition at 3 (citing *Commission States Future Policy on Incomplete and Patently Defective AM and FM Construction Permit Applications*, Public Notice, 56 RR.2d 776 (1984) (as subsequently published in the Federal Register, 49 Fed. Reg. 47331, 47332 (Dec. 3, 1984)) ("*Defective Applications Public Notice*").

[8] *See Media Bureau Announces Availability of the Revised FCC Form 318 and the Filing Procedures for October 15-October 29, 2013, Low Power FM Filing Window*, Public Notice, 28 FCC Rcd 8854 (MB 2013) ("*LPFM Public Notice*").

[9] Opposition at 3; *see LPFM Public Notice* at 8854 (requiring prospective LPFM applicants to protect pending broadcast applications filed before June 17, 2013).

[10] Opposition at 3.

[11] Opposition at 4-7 (citing *Radio Power, Inc.*, Letter, 27 FCC Rcd 1465 (MB 2012); *John F. Garziglia, Esq.*, Letter, 26 FCC Rcd 12685 (MB 2011) ("*Mattoon*"); *Broadcast Towers, Inc.*, Letter, 26 FCC Rcd 7681 (MB 2011)).

Application until Lake Country has shown that each previous "hop" complied fully with Commission rules and policies.[12]

In its Reply, Lake Country argues that Saga's interim "hopping" argument should be construed as an impermissible petition for reconsideration of the *Letter Decision*. In particular, Lake Country argues that Saga's "hopping" arguments are: (1) repetitious of arguments made below and rejected in the *Letter Decision* as untimely; and (2) based on allegations that Saga previously withdrew and therefore may not raise again.[13] Lake Country also claims that Saga lacks standing to make the LPFM argument because "such a claim would have to be made by an LPFM applicant . . . [who would] have the grounds to make the claim that the amended CP Application impinged on its LPFM application where the pending un-amended CP Application did not."[14] Substantively, Lake Country contends that: (1) the CP Application remains "pending" until the action dismissing it becomes final, and is thus protected from later LPFM applications under the express terms of the *LPFM Public Notice*[15]; and (2) the plain meaning of *"nunc pro tunc*" in our reinstatement policy is "now for then," so the operative cutoff date should be the filing date of the CP Application, not the Amendment.[16] Finally, Lake Country contends that even if the Commission were to consider Saga's "hopping" arguments on the merits, the decisions Saga cites are actually based on specific rule violations and merely express "a general antipathy" toward translator "hopping."[17]

Discussion. The Commission favorably considers petitions for reconsideration of an initial dismissal or return of an application when the applicant submits "a relatively minor curative amendment" within 30 days.[18] In this case, Lake Country's Amendment contains a proposal that satisfies the "lack of population" exception of Section 74.1204(d).[19] Saga apparently concedes that Lake Country no longer violates the contour overlap rule; however, it raises additional policy concerns regarding potential harm to LPFM applicants and the allegedly abusive practice of translator "hopping," as well as potential specific rule violations. We address these arguments below.

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[12] Opposition at 4, 7. We disregard any legal arguments made in the engineering exhibit submitted with the Opposition. *See* Attachment 1, "Engineering Statement." A person who is neither a party nor legal counsel may not act as legal counsel before the Commission. 47 C.F.R. § 1.23(a). Any argument put forth by such a person may be disregarded. *See Calvary Chapel of Costa Mesa, Inc.*, Letter, 27 FCC Rcd 557, 559 n.13 (MB 2012).

[13] Reply at 5-7 (citing *Colorado Radio Corp. v. FCC*, 118 F.2d 24, 26 (D.C. Cir. 1941)). In its earlier "Reply to Opposition to Petition for Reconsideration and Request for Order to Cease and Desist," filed September 18, 2008, Saga "withdr[ew] its Objection on the grounds that Lake Country did not construct interim 'hops' based on a declarations of James L. Travis, Lake Country's technical consultant, explaining how he constructed the interim facilities without leaving any trace of construction." *Id*. at 2, n.2.

[14] Reply at 4-5. Lake Country goes on to predict that such a complaint is unlikely because "there is virtually no greater area encompassed, and therefore no greater protection required, for the CP Application as amended" than under the original proposal. *Id*. at 5.

[15] Reply at 4 (citing 47 C.F.R. § 73.3525(h), 73.3588(c)(2) (providing that an application is "pending" for purposes of removing application conflicts and filing petitions to deny, respectively, until the order granting or denying it is no longer subject to reconsideration or review by the FCC or any court)).

[16] Reply at 5.

[17] Reply at 8-9.

[18] *Defective Applications Public Notice*, 49 Fed. Reg. at 47332; *see also Donald E. Martin, Esq.*, Letter, 27 FCC Rcd 12149 (MB 2012).

[19] 47 C.F.R. § 74.1204(d).

Procedural matters. We disagree with Lake Country that Saga is procedurally barred from making the arguments and allegations in the Opposition. Lake Country cites no rule or precedent supporting its argument that the Opposition should be treated as a *de facto* petition for reconsideration, or otherwise establishing that a party filing an opposition is limited by arguments it has made or failed to make earlier in the proceeding. We also reject Lake Country's contention that the *Letter Decision* conclusively disposed of Saga's "hopping" arguments. One of Saga's primary arguments—that Lake Country abused Commission processes by attempting a major change using a series of minor modifications—is based on a series of cases that were decided in 2011 and 2012, well after the pleadings were filed that led to the *Letter Decision*. We did not have the abuse of process issue before us at the time of the *Letter Decision*, nor did we address it therein. Although we may not now reconsider our grant of Lake Country's earlier, now-final modification applications based on alleged specific rule violations in connection with those applications, we may properly take into account whether Lake Country abused Commission processes in determining whether grant of the CP Application comports with the public interest.[20] Finally, Lake Country fails to support its contention that Saga lacks standing to make the specific argument that grant of the CP Application would prejudice LPFM applicants. Indeed, such a requirement would be inconsistent with the longstanding principle that, in the broadcast regulatory context, standing is accorded to vindicate the public interest.[21] Therefore, we will consider Saga's "hopping" argument on the merits.

LPFM applicants. Our above-stated policy of reinstating dismissed applications *nunc pro tunc* if a minor curative amendment is filed within 30 days provides a "reasonable accommodation" to applicants; however, it inevitably subjects competing applicants to the original filing (cut-off) date of the reinstated application.[22] Saga has not provided any reason why this well-established policy should operate differently in the context of the October LPFM filing window. Therefore, once reinstated *nunc pro tunc*, the CP Application will be treated as though it were filed without defect on its original filing date, July 14, 2008.[23] We agree with Lake Country that the CP Application is considered "pending" under the terms of the *LPFM Public Notice* (and therefore protected from LPFM applications) from July 14, 2008, until all action taken on it is final.[24]

Translator "hopping." In the 2011 *Mattoon* decision, we first articulated the policy that a licensee who effectuates a major change in antenna location by means of a succession of serial minor

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[20] *See Russell M. Perry*, Letter, 27 FCC Rcd 5955, 5956 (MB 2012) ("*Perry*") (". . . the Commission can take appropriate enforcement action, including denial of applications that are intended to evade the [major change] requirement or subvert its purpose . . .on the ground that grant would not serve the public interest.").

[21] *Office of Communication of the United Church of Christ v. FCC*, 359 F.2d 994, 1001 (D.C. Cir. 1966) (expanding standing categories for Commission purposes beyond economic interest and electrical interference to include local listeners).

[22] *Defective Applications Public Notice*, 49 Fed. Reg. at 47332; *Premier Broadcasting, Inc.*, Memorandum Opinion and Order, 7 FCC Rcd 867, 868 (1992) (" . . . grant of the South Coast petition for reconsideration returned its application to "pending and undecided" status *nunc pro tunc* its original file date (July 12, 1985), thereby making the later-filed pending Montecito application "inconsistent," in violation of 47 C.F.R. § 73.3518.").

[23] *See, e.g.*, *Deleted Station WPHR(FM), Ashtabula, Ohio*, Memorandum Opinion and Order, 11 FCC Rcd 8513, 8514-15 (1996) (describing *"nunc pro tunc*" consideration as "as if it were received without defect on the original filing date").

[24] *LPFM Public Notice*, 28 FCC Rcd at 8854; *see, e.g.*, 47 C.F.R. § 74.1233(d)(1) ("The rights of an applicant in a [translator minor modification] queue ripen only upon a final determination that the lead applicant is unacceptable . . ."); 47 U.S.C. § 311(c)(4) ("For the purposes of this subsection an application shall be deemed to be "pending" before the Commission from the time such application is filed with the Commission until an order of the Commission granting or denying it is no longer subject to rehearing by the Commission or to review by any court.").

changes may be abusing the Commission's processes.[25] Regardless of any underlying specific rule violations, the Commission can take appropriate action to enforce this policy, including denial of applications.[26] The primary considerations underlying the *Mattoon* policy are: (1) to protect the *Ashbacker* rights of potential applicants to comparative consideration for the "same" license (i.e., that are mutually exclusive with the final destination of the "hopping" station); and (2) to prevent, in the public interest, FM translator stations from abusing Commission processes in order to "abandon[] their present service areas" in favor of more populous locations.[27]

Neither consideration inheres in this case. Because the CP Application returns the Station's transmitting antenna to its approximate starting location, it does not implicate *Ashbacker* due process concerns. For the same reason, Lake Country cannot be considered to have abused Commission processes in order to "abandon" its original service area. The contrast between our *Mattoon* policy and the type of "major" non-adjacent frequency change effected here is further evidenced by the fact that we routinely permit non-adjacent channel changes though displacement waiver grants.[28] For these reasons, we decline to extend our policy regarding serial antenna relocations to the circumstances presented here.

Conclusion. Based on the above, IT IS ORDERED that the Petition for Reconsideration filed by Lake Country on July 9, 2013, IS GRANTED and the CP Application (File No. BPFT-20080714ADP) and License Application (File No. BLFT-20080822ABF) ARE REINSTATED *nunc pro tunc*.

IT IS FURTHER ORDERED that the CP Application (File No. BPFT-20080714ADP) IS GRANTED.

Sincerely,

Peter H. Doyle
Chief, Audio Division
Media Bureau

[25] *Mattoon*, 26 FCC Rcd at 12687.

[26] *Supra*, note 22.

[27] *Mattoon*, 26 FCC Rcd at 12687-88 (citing *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327 (1945) (requiring the Commission to "use the same set of procedures to process the applications of all similarly situated persons who come before it seeking the same license."); *Committee for Effective Cellular Rules v. FCC*, 53 F.3d 1309, 1321 (D.C. Cir. 1995) ("the ability to compete on an equal basis . . . is the essence of *Ashbacker*.")); *see also Perry*, 27 FCC Rcd at 5956-57.

[28] *See, e.g.*, *Richard R. Zaragoza, Esq.*, Letter, 28 FCC Rcd 8924, 8925 (MB 2013) (referring to an underlying staff decision that granted a waiver to move a displaced translator station to a non-adjacent frequency); *see also, e.g.*, *Wilks License Company-Columbus LLC*, Letter, Ref. No. 1800B3-RG (MB Oct. 27, 2010).